

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:SF:POSTU-167064-01
MTRobus

date: July 8, 2002

to: Bernard J. Deveney, Appraisal Program Coordinator
LMSB Field Specialists, Engineer Teams, MS: 6-1-07
Internal Revenue Service
450 Golden Gate Avenue
San Francisco, CA 94102

from: Area Counsel
(Communications, Technology, and Media: Oakland)

subject: [REDACTED] and Subsidiaries
EIN: [REDACTED] - TYE: [REDACTED]

U.I.L. No. 170-00-00 Contributions and Gifts

Non-docketed Significant Advice Review ("NSAR")

Disclosure Statement

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

This advice is in response to your request for assistance, and relies on facts provided by you to our office. If you find that any facts are incorrect, please advise us immediately so that we may modify and correct this advice. This advice is subject to 10-day post-review by the National Office. CCDM 35.3.19.4. Accordingly, we request that you do not act on this advice until we have advised you of the National Office's comments, if any, concerning this advice

ISSUE

Is [REDACTED] and Subsidiaries ("Taxpayer") entitled to a charitable contribution deduction in [REDACTED] in the amount of \$ [REDACTED] for land conveyed to [REDACTED]
[REDACTED]

CONCLUSION

The Taxpayer is **not** entitled to a charitable contribution deduction, because of the quid pro quo bargained for and received by [REDACTED].

DISCUSSION OF FACTS AND LAW**FACTS**

The following facts are based on (1) documents and affidavits provided by the Taxpayer, and (2) statements made by [REDACTED] and [REDACTED] in interviews conducted by the Internal Revenue Service pursuant to [REDACTED]. At the time of the transaction at issue in this case ([REDACTED] to [REDACTED]), [REDACTED]

[REDACTED]

Contract between [REDACTED] and [REDACTED]

On [REDACTED], [REDACTED]

[REDACTED]

[REDACTED]

Appraised value of the

Reasons for purchase of the

[REDACTED]

[REDACTED]

Sequence of events regarding how [REDACTED] assigned the contract to
[REDACTED]

[REDACTED]

[REDACTED]

4. [REDACTED]
[REDACTED]
[REDACTED]

5. [REDACTED]
[REDACTED]

6. [REDACTED]
[REDACTED]
[REDACTED]

7. [REDACTED]
[REDACTED]
[REDACTED]

Letter of Intent dated [REDACTED]

On [REDACTED] [REDACTED] and [REDACTED] signed a letter of intent confirming "[REDACTED]
[REDACTED]
[REDACTED]"

Some of the "business terms" outlined in the letter are as follows:

[REDACTED]

The letter also provided that the [REDACTED] tract would be conveyed subject to a "right of reverter" and "development

restrictions," and the deed would contain certain provisions that
if not met by [REDACTED] would result in the property reverting to
[REDACTED]. Those provisions were as follows:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

meeting.

[REDACTED]

[REDACTED]

"

Assignment of contract of purchase and sale

On [REDACTED], [REDACTED] and [REDACTED] executed a document entitled "Assignment of Contract of Purchase and Sale," whereby [REDACTED] assigned to [REDACTED] its rights under its contract with [REDACTED]. The assignment states:

[REDACTED]

[REDACTED]

Although the consideration referred to in the assignment is not described therein, the document was executed in accordance with the terms outlined in the letter of intent of the same date.

The division of the property [REDACTED]

[REDACTED]

Board Approval

According to the minutes of a special board meeting on [REDACTED], the Board of Trustees of [REDACTED] accepted the [REDACTED] land from [REDACTED] and approved and ratified both the [REDACTED] contract of purchase and sale with [REDACTED] and the assignment of the contract to [REDACTED].

Special Warranty Deeds

[REDACTED]

[REDACTED]. These six restrictions and covenants are as follows:

1. [REDACTED]
[REDACTED].

2. [REDACTED]
[REDACTED].

3. [REDACTED]
[REDACTED].

4. [REDACTED]
[REDACTED].

5. [REDACTED]
[REDACTED].

6. [REDACTED]
[REDACTED].

The deed also provided that these restrictions and covenants shall run with the property for a period totaling [REDACTED].

[REDACTED] states in his affidavit the following regarding these restrictions:

[REDACTED]

[REDACTED]

[REDACTED]

Both deeds were recorded on [REDACTED]. Settlement also occurred on that date, with [REDACTED] paying the sales price and all closing costs.

Acquisition of additional land

According to the minutes of a regular board meeting on [REDACTED] the Board passed a motion to buy [REDACTED] known as the [REDACTED] for \$[REDACTED] from [REDACTED]. This tract is [REDACTED] acquired by [REDACTED] from [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Deed modifications and compliance with restrictions

After conveyance of the tract, [REDACTED] subsequently wished to modify the deed and so ensued correspondence between [REDACTED] and [REDACTED] regarding the proposed changes.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] had the following to say about the deed modification process with [REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

LAW

Section 170(a)(1) of the Internal Revenue Code allows a deduction for any charitable contribution (as defined in section 170(c)) payment of which is made within a taxable year. The definition of charitable contribution includes "a contribution or gift" to or for the use of a state or a political subdivision thereof, "but only if the contribution or gift is made for exclusively public purposes." I.R.C. § 170(c).

In *DeJong v. Commissioner*, 36 T.C. 896 (1961), *aff'd*, 309 F.2d 373 (9th Cir. 1962), the Tax Court held that the term "charitable contribution" as used in I.R.C. § 170 is synonymous with the word "gift." It then enunciated the following test: "[i]f a payment proceeds primarily from the incentive of anticipated benefit to the payor beyond the satisfaction which flows from the performance of a generous act, it is not a gift." *DeJong*, 36 T.C. at 899. The Ninth Circuit Court of Appeals, in its opinion affirming *DeJong*, broadened the Tax Court's holding and held that the principles applied by the Supreme Court in *Duberstein v. Commissioner*, 363 U.S. 278 (1960) with regard to the meaning of the term "gift" as used in I.R.C. § 102(a), were equally applicable with regard to the term "gift" as used in I.R.C. § 170. *DeJong*, 309 F.2d at 377-379.

The Ninth Circuit subsequently departed from the *Duberstein* "detached and disinterested generosity" criteria for contributions by business entities. In *United States v. Transamerica Corporation*, 392 F.2d 522 (9th Cir. 1968), the Ninth Circuit noted that an absolute requirement of detached and disinterested generosity or lack of any business purpose would tend to deny substantially all charitable contributions made by a business. Instead, the Ninth Circuit applied a new test permitting a corporation to receive an indirect business benefit incidental to the public use or to public recognition, but if it receives a direct economic benefit, I.R.C. § 170 is not met. *United States v. Transamerica Corporation*, 392 F.2d at 524. This was further refined in *Stubbs v. United States*, 428 F.2d 885 (9th Cir. 1970), wherein the Court found that the taxpayers did not deed property to the city of Tucson, Arizona, for use as a public street out of a sufficiently charitable motive to qualify the transaction as a charitable gift. The purpose behind the transfer was to assure favorable zoning and to benefit remaining portions of the taxpayers' property, and, accordingly, no deduction was allowed under I.R.C. § 170. The Court said:

The inquiry into motive and purpose here does more than

probe the subjective attitude of the donors and the extent to which public spirited and charitable benevolence prompted their action. The inquiry serves to expose the true nature of the transaction: that, as the jury found, the "gift" (as in *DeJong*) was in expectation of the receipt of certain specific direct economic benefits within the power of the recipient to bestow directly or indirectly, which otherwise might not be forthcoming. Taxpayers apparently wished to assure favorable zoning (otherwise uncertain) by guaranteeing public access to the mobile home development, and to secure public street frontage for some of their property. In both respects their objectives were realized.

Stubbs, 428 F.2d at 887.

Stubbs stands for the proposition that an inquiry into motive and purpose serves to expose the true nature of the transaction.

In *Allen v. United States*, 541 F.2d 786 (9th Cir. 1976), the Ninth Circuit again held that *Duberstein* was too broad in determining what constitutes a charitable contribution; the proper test being the dominant purpose of the transaction, and that the existence of a "quid pro quo" could be considered as evidence that the dominant purpose behind the transfer was the expectation of economic benefit. According to the Court in *Allen*, "*Stubbs* teaches that motive and purpose are questions of fact." *Allen* 541 F.2d at 788.

In *Singer Company v. United States*, 449 F.2d 413 (Ct. Cl. 1971), the Court of Claims also refused to apply *Duberstein* to I.R.C. § 170 cases involving business entities. Instead the Court adopted the "quid pro quo" test. Under this test, it does not matter whether the benefits received by the donor are direct or indirect; but rather if the benefits received, or expected to be received, are substantial, that is, if the benefits which inure to the transferor are greater than those which inure to the general public, then the transferor has received a "quid pro quo" sufficient to deny it a deduction under I.R.C. § 170. *Singer Company v. United States*, 449 F.2d at 423. In *Louisville & Nashville Railroad Co. v. Commissioner*, 66 T.C. 962 (1976), the Tax Court noted the *Singer* test with approval. In a subsequent opinion, *Saba v. Commissioner*, T.C. Memo. 1980-199, however, the Tax Court clarified that approval by stating the following:

A careful reading of *Louisville and Nashville Railroad Company*. . . shows that we stopped short of approving

the *Singer* language that equates the receipt or expected receipt of substantial benefits with "benefits" greater than those that inure to the general public from the transfers." In fact, in *Louisville and Nashville Railroad Company*...our sole reference to the *Singer* case reflects approval only of the test to which we have subscribed in numerous cases: that "a transfer did not qualify as a charitable contribution under section 170 if such 'transfer was made with the expectation of receiving something in return as quid pro quo.'" [Citations omitted.]

Saba v. Commissioner, T.C. Memo. 1980-199.

In the *Saba* case the Tax Court found that a partnership's transfer of 12.1 acres of property to the State of Florida did not constitute a charitable contribution because the partnership expected to, and did, profit directly from substantial financial and nonfinancial returns.

It is well established that no charitable contribution deduction is allowed unless the taxpayer possesses the requisite donative intent, that is, the taxpayer must not expect a substantial benefit as a quid pro quo for the transfer. *Transamerica Corp. v. United States*, 902 F.2d 1540 (Fed. Cir. 1990), *aff'g* 15 Cl. Ct. 420 (1988). In determining whether a taxpayer has made a contribution with an expectation of a quid pro quo, courts have customarily examined "the external features of the transaction in question." *Hernandez v. Commissioner*, 490 U.S. 680, 690 (1989). Courts have inquired into both the intentions of the donor in making a particular conveyance and the intentions of the donee in accepting the contribution. *Ottawa Silica Co. v. United States*, 699 F.2d 1124, 1131-1135 (Fed. Cir. 1983).

As was stressed by the Supreme Court in *United States v. American Bar Endowment*, 477 U.S. 105 (1986), "[t]he sine qua non of a charitable contribution is a transfer of money or property without adequate consideration. The taxpayer, therefore, must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return." *Id.* at 118.

ANALYSIS OF FACTS AND LAW

The facts in this case indicate that [REDACTED] and [REDACTED] conducted negotiations over a period of time in order to achieve their respective goals. Each gave up something of value and

gained something of value in return which could not have been obtained otherwise. [REDACTED] received the following benefits:

1. [REDACTED]

2. [REDACTED]

3. [REDACTED]

4. [REDACTED]

5. [REDACTED]

6. [REDACTED]

7. [REDACTED]

8. [REDACTED]

In exchange for all of the above benefits, [REDACTED] received the [REDACTED].

The evidence discussed herein proves that the transfer of the property to [REDACTED] was in exchange for a quid pro quo. Thus, [REDACTED] is precluded from claiming a charitable contribution deduction. [REDACTED] received a direct economic benefit from the transaction in the way of the assignment of the

purchase contract and other considerations. Hence, I.R.C. § 170 is not met. *United States v. Transamerica Corporation*, 392 F.2d at 524; *Stubbs v. United States*, 428 F.2d at 887. The evidence of the quid pro quo establishes that [REDACTED] dominant purpose behind the transfer was its expectation of economic benefit. See *Allen* 541 F.2d at 788. Arguably, [REDACTED] received more from the exchange than what inured to the general public under the standard enunciated in *Singer Company v. United States*, 449 F.2d at 423. For example, [REDACTED] received immediately some of the economic benefits described above; whereas, [REDACTED]'s economic benefit was contingent. It is sufficient, however, that the transfer was made with the expectation of receiving something in return. See *Saba v. Commissioner*, T.C. Memo. 1980-199; *Transamerica Corp. v. United States*, 902 F.2d at 1544.

The case at hand involves the exchange of economic benefits by two parties each clearly in possession of something of value desired by the other. Because of those facts, the Taxpayer's deduction is not allowable as a contribution under I.R.C. § 170.

TAXPAYER'S POSITION

[REDACTED] alleges that it is entitled to a charitable contribution deduction in [REDACTED], the year in which all the conditions of the transfer were met and the contribution deemed completed. [REDACTED]

[REDACTED]. For contributions of property, Treas. Reg. § 1.170A-1(b) states that a contribution is made at the time delivery is effected. If, as of the date of gift, a transfer for charitable purposes is dependent upon the fulfillment of certain conditions in order that it might become effective, Treas. Reg. § 1.170A-1(e) states that no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible. The phrase "so remote as to be negligible" is not defined in the regulations but clarification can be found in case law.

According to [REDACTED], its situation is very similar to the case of *Briggs v. Commissioner*, 72 T.C. 646 (1979), in which the Tax Court disallowed a taxpayer's deduction for the transfer of land to a foundation where such transfer was subject to certain conditions. In ruling against the taxpayer, the court focused on the foundation's financial condition at the date of transfer. It concluded that the possibility of breach of the conditions due to the foundation's limited financial capability was not so remote as to be negligible. [REDACTED] relies on

Briggs to support its deduction in [REDACTED], when all conditions of the transfer were met.

[REDACTED] has not addressed the "quid pro quo" issue, and does not contend (at least at this time) that the transfer of the property to [REDACTED] was a "bargain sale." Such a contention would be untenable. A taxpayer who makes a bargain sale to a qualified donee is typically entitled to a charitable contribution deduction equal to the difference between the value of the property transferred and the amount realized from its transfer. See *Stark v. Commissioner*, 86 T.C. 243, 255-256 (1986). To qualify as a bargain sale, the transaction must satisfy a two-pronged test: (1) the excess payment must have been made with the intention of making a gift; and (2) the value of the property conveyed must exceed the value of what the donor received. See *Szabo v. Commissioner*, T.C. Memo. 1992-255, citing *United States v. American Bar Endowment*, 477 U.S. 105 (1986). The first prong focuses on donative intent. A taxpayer who negotiates for the best deal he can obtain cannot maintain a deduction by arguing that the bargain struck was not a fair one. *Id.* Because this was a commercial transaction, devoid of eleemosynary purpose, the first prong has not been satisfied, and there is no need to reach the second prong which is the valuation issue. See *Southern Pacific Transportation Co. v. Commissioner*, 75 T.C. 497, 604 n.118 (1980).

Please call me at (415) 744-9217 if you have any questions.

LAUREL M. ROBINSON
Associate Area Counsel
(Large and Mid-Size Business)

By: _____
MARION T. ROBUS
Attorney (LMSB)

cc: Office of Chief Counsel (via email)
Internal Revenue Service
1111 Constitution Ave., N.W.
Room 4510
Washington, D.C. 20224

Linda Burke (via email)
Division Counsel

James Clark (via email)
Area Counsel, Oakland

[REDACTED]
Team Coordinator, Exam Group [REDACTED]

[REDACTED]
Team Manager, Exam Group [REDACTED]
Internal Revenue Service
[REDACTED]